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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHAMUSIDEEN A. ALIU, Plaintiff and Appellant, v. LONG BEACH UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B221910 (Los Angeles County Super. Ct. No. BC401529)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed in part, reversed in part and remanded with directions.

Law Offices of George E. Omoko and George E. Omoko for Plaintiff and Appellant.

Declues Burkett & Thompson, Jeffrey P. Thompson and Gregory A. Wille, for Defendant and Respondent.

Shamusideen A. Aliu filed this action against his former employer Long Beach Unified School District (the District) for discrimination and related claims in violation of the Fair Employment and Housing Act (FEHA) (see Gov. Code, § 12900 et seq.).[1] The trial court granted the District's motion for summary judgment and entered judgment against Aliu. On appeal, Aliu challenges the court's decision to grant summary judgment and its orders sustaining demurrers to portions of his complaint and first-amended complaint (operative pleading) without leave to amend. We affirm in part, reverse in part and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. Aliu's Employment With the District

Aliu, an African-American (Nigerian) male and professed Muslim, was employed by the District on December 10, 1998 as a Computer Support Specialist Assistant in Computer Shop 7. His job was to provide computer assistance and technical advice to personnel at seven District high schools. Aliu was apparently stationed, at least initially, at the District's maintenance yard and went to his assigned schools on an as-needed basis and for special projects. Aliu had a number of supervisors at the District, including Dave Sutton, John Nelson, Clifford Davis, Kevin Young, Steve Crothers, Alex Trusler and Matt Woods.[2]

a. *Unsuccessful Promotions and Hiring for Other Positions*

By all accounts, Aliu performed his job adequately for the schools. He received a satisfactory ranking, the highest achievable standard, on each of his 1999 through 2002 biannual performance reviews as well as favorable comments, and 20 letters from school

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[1] Statutory references are to the Government Code, unless otherwise indicated.

[2] Although the record refers to each of these individuals by his job title, it fails to sufficiently provide either a corresponding job description or an indication of how each job fits into the District's employment hierarchy. Consequently, we assume these individuals served in an employee supervisory capacity, as alleged.

personnel commending his technical knowledge and assistance.[3] Nonetheless, Aliu was never promoted or selected for other positions during his approximately eight years of employment at the District. According to Aliu, he was denied a total of 11 promotions or other positions in his field, for which he was qualified. None of the candidates selected over Aliu was a member of a protected class; all were Caucasian males, under the age of 40. The District maintains that Aliu unsuccessfully sought a total of five, not 11 promotions or other positions, and the successful candidates were the most qualified for the positions.

The undisputed evidence reflects on January 7, 1999, at the age of 44, Aliu applied for his first promotion or change in position, as Computer Equipment and Network Support Manager, and achieved Rank 2 on the promotion eligibility list following the competitive examination process. On April 19, 1999, Aliu was rejected for the position. On April 26, 1999, Dave Sutton was selected for the position. On September 27, 1999, Aliu applied for the position of Computer Equipment Support Services Supervisor. This time he achieved Rank 4 on the promotion eligibility list. Aliu was rejected for the position on December 16, 1999. Clifford Davis was selected for the position on January 18, 1999. On May 8, 2000, Aliu applied for the position of Computer Equipment Installation and Maintenance Manager, and was listed as Rank 4. He was thereafter rejected and Clifford Davis was selected for the position on July 17, 2000. On May 2, 2005, Aliu applied for the position of Network Support Specialist, for which he was listed as Rank 3. On July 28, 2005, he was rejected and Alex Trusler was selected for the position. On July 25, 2005, Aliu applied for the position of Computer Equipment Support Services Supervisor. He was rejected on September 26, 2005, and Steven Crothers was selected for the position on October 3, 2005.

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[3] In his interrogatory responses, Aliu stated he had unjustifiably received an "improvement needed" rating on one of his 2004 biannual performance reviews. Following a grievance meeting, the District purportedly agreed to remove the review from his personnel file.

Aliu considered himself qualified for each of these promotions or positions, given his education and experience. He had a bachelor's degree from California State University, Dominguez Hills, and an associate's degree from West Los Angeles College. He was certified on various Microsoft applications, as well as Novell. Aliu had over five years of experience in computer support services for the District and 10 years in computer support services elsewhere.

b. *Demotions and Foreclosed Training Opportunities*

Between January and April 2000, the District hired new Computer Support Specialist Assistants to serve the high schools that had been assigned to Aliu. Aliu told Dave Nelson and Clifford Davis of his desire to continue serving the high schools and asked the reason he had been replaced. Nelson "falsely" told Aliu that the high schools principals no longer wanted to work with him. Aliu also asked to be promoted to the position of Computer Support Specialist. Nelson and Davis promised to consider Aliu's request but never followed up with him.

At some point, the newly-hired Computer Support Specialist Assistants were promoted to School Information Services Technician, a newly created position with an annual salary that was $5,443.37 more than Aliu's. None of these new employees was African-American.

On August 9, 2000, District employees, among them Kevin Young, Alex Trusler, and Steve Crothers were given computer training and certification at the District's expense. None of these employees was a member of a protected class. Aliu was excluded from these training sessions, which deprived him of the operational experience necessary for promotion or other employment at the District.

2. Aliu's Leaves of Absence

Because of a job-related car collision on August 19, 2000, Aliu suffered back injuries and left work. He was placed on total disability and underwent treatment. Aliu resumed working for two days in February 2001, under pressure from Clifford Davis and Kevin Young, who continued to demand his return. In March 2001, Aliu filed an

administrative claim with the Department of Fair Employment and Housing (DEFH) and received a right-to-sue letter.

On August 6, 2001, Aliu's treating physician released him to return with no work restrictions. Kevin Young informed Aliu that as a Computer Technician, Aliu had been reassigned to serve the elementary and middle schools, rather than the high schools. Aliu reminded Young he was a Computer Support Specialist, not a Computer Technician, and he protested the reassignment.

Aliu's second leave of absence stemmed from incidents with Steven Crothers, with whom Aliu had a history of job-related conflicts. When Aliu was hired, Crothers was already employed at Computer Shop 7. On August 14, 2001, Crothers purportedly said he would "lay [Aliu] on a stretcher" if Aliu were to "ever opened [his] mouth or talked in front of [Crothers]." Aliu reported the threat in writing to Kevin Young, who took no action.

Another incident occurred on February 9, 2004, in which Crothers supposedly threatened to kill Aliu, while "banging" a piece of paper on Aliu's desk. Crothers also purportedly informed Aliu, "There is no room for promotion for you," adding that he was a friend of both Kevin Young and Matt Woods. Aliu reported the incident to Young and Woods, who investigated, determined Aliu was the aggressor and counseled him in writing.

In September 2004, Aliu was transferred from the maintenance yard to the District board building, and reassigned to serve high schools. As a result, Aliu no longer had direct contact with Steve Crothers. Nonetheless, Aliu and Crothers continued to have conflicts, although they worked in different locations, and Crothers was not Aliu's direct supervisor. On October 11, 2005, within days of his promotion to Computer Equipment Support Services Supervisor, Crothers notified Aliu that he would be tracked throughout the day with a global positioning satellite system. Aliu feared Crothers would be able to locate him at any time to carry out prior threats of harm. Aliu filed a grievance with the District administration, but he received no reply.

On or about November 1, 2005, Aliu was treated by Dr. Thomas Curtis for anxiety, depression and stress induced by Steve Crothers's continuous harassment. Aliu then learned he was to be transferred back to the maintenance yard and placed under Crothers's supervision. Aliu filed a grievance, but after a hearing, his request to remain under Matt Woods's supervision at the District board building was denied. Thereafter, citing stress-related reasons concerning Crothers, Aliu took a second leave of absence and was diagnosed by Dr. Curtis as suffering from depression not otherwise specified and anxiety, panic attacks and post traumatic reaction. Aliu remained on disability leave from February to July 2006. During this time, Aliu filed another administrative claim with the DFEH and received a right-to-sue letter.

3. Aliu's Return to Work and Accommodation Meetings

In July 2006, Aliu briefly returned to work, before taking another medical leave of absence from July 13 to October 13, 2006 for emotional stress. In requesting the leave of absence on Aliu's behalf, Dr. Curtis stated, "The patient cannot be exposed to Steve Crothers, Matt Woods or Kevin Young at work or in deposition." In a comprehensive psychiatric evaluation of Aliu on July 24, 2006, Dr. Curtis concluded that Aliu had "an overall moderate degree of permanent mental and behavioral impairment" and recommended future psychiatric treatment. Dr. Curtis recommended the District provide Aliu with the following accommodations: (1) "restricted contact" with Steve Crothers; and (2) transfer back to the District board building, away from Crother's supervision, to serve the high schools. On October 3, 2006, Dr. Curtis released Aliu to return to work on October 13, 2006 with two restrictions: Aliu "cannot be exposed to Steve Crothers or Kevin Young at work or at depositions."

On October 11, 2006, following an accommodation meeting with Aliu, the District concluded it could not reasonably provide Aliu's requested accommodations without undue hardship.

On October 17, 2006, Dr. Curtis concluded that Aliu could return to his job on November 16, 2006, without work restrictions.

On November 8, 2006, the District referred Aliu for a "fitness for duty" evaluation by Dr. Barbara Greenberg. Pending the evaluation, on November 13, 2006, Aliu was placed on administrative leave.

Dr. Greenburg met with Aliu for a fitness for duty evaluation on December 4, 2006. She reported that Aliu was not credible and diagnosed Aliu as suffering from personality disorder with prominent passive aggressive, narcissistic and paranoid personality features. In her report to the District, Dr. Greenberg concluded Aliu was psychologically unfit for duty in that he was unable to perform the essential functions his job required.

On January 9, 2007, Aliu was approved for extended administrative leave. On or about March 14, 2007, the District attempted an accommodation meeting with Aliu, but the meeting did not take place.

On April 11, 2007, the District held a second accommodation meeting with Aliu and agreed to consider an updated report from Dr. Curtis on Aliu's condition. On April 25, 2007, Dr. Curtis prepared a report in which he concluded that due to the passage of time and appropriate psychological treatment, Aliu had recovered sufficiently from his psychiatric injuries to resume his job on May 3, 2007, without work restrictions. The District agreed to have Dr. Greenberg review the updated report, but Aliu failed to provide authorization for the release of the report until six months later, when Aliu's statutory leave had expired.

On August 15, 2007, Aliu was asked to resign or retire.

4. Aliu's Complaint and First-Amended Complaint and the District's Successful Demurrers

Aliu filed an unverified complaint on November 8, 2008, in which he asserted seven causes of action against the District, the District Personnel Commission, and individual District employees. The District demurred to the complaint on various grounds. Following a hearing on February 18, 2009, the trial court sustained the demurrer without leave to amend on all causes of action as to the District Personnel Commission. The court overruled the demurrer on the first cause of action for race

discrimination against the District, and sustained the demurrer with leave to amend on the remaining six causes of action.

On February 19, 2009, Aliu filed an unverified first-amended complaint, the operative pleading, in which he alleged seven causes of action. Against the District, Aliu alleged race discrimination, disability discrimination, failure to engage in good faith interactive process, age discrimination and failure to prevent race discrimination. Against the District and individual District employees Woods, Young and Crothers, Aliu alleged racial and religious harassment. The District filed a demurrer. Following a hearing on March 24, 2009, the trial court sustained the demurrer to the causes of action for age discrimination and race and religious harassment without leave to amend. The causes of action alleged against the District alone for race discrimination, disability discrimination, failure to engage in good faith interactive process, and failure to prevent race discrimination remained. The District filed an answer on April 6, 2009.

5. The District's Summary Adjudication/Summary Judgment Motions

On August 8, 2009, the District moved for summary judgment or in the alternative summary adjudication as to the FEHA claims. After two days of argument, the trial court granted the motion for summary judgment on November 23, 2009. As to the causes of action for race discrimination and failure to prevent race discrimination, the court concluded Aliu had failed to present admissible evidence of discriminatory animus, and the District had presented sufficient evidence to show a legitimate, nondiscriminatory reason for terminating Aliu. With respect to the claim of disability discrimination, the court concluded Aliu had not shown a causal connection between his purported disability and any discrimination. As for the claim of failing to engage in the good faith interactive process, the court concluded Aliu's claim was based solely on speculation, not admissible evidence of discriminatory animus, and the District had presented sufficient evidence it had engaged in an interactive process with Aliu.

The trial court entered judgment in favor of the District on December 15, 2009. On January 15, 2010, Aliu filed a timely appeal, challenging both the order granting

summary judgment and the orders sustaining the District's demurrers to portions of Aliu complaints without leave to amend.

DISCUSSION

The Summary Adjudication/ Summary Judgment Motions

1. Standard of Review

Motions for summary adjudication and summary judgment are procedurally identical (Code Civ. Proc., § 437c, subds. (c) & (f)(2)), and our review of rulings on these motions is de novo. We decide independently whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

2. Race Discrimination

a. *Governing Legal Principles*

FEHA prohibits an employer from, among other things, discriminating against an employee on the basis of race in the terms and conditions of employment. (§ 12940, subd. (a).) Discriminatory intent is an essential element of Aliu's race discrimination claim. (§ 12940, subd. (a); *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662.) Because direct evidence of discriminatory intent is rare, California has adopted the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (*McDonnell Douglas*). (*Guz, supra*, 24 Cal.4th at p. 354.)

"At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. . . . [¶] Generally, the plaintiff must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the position [he or she] held, (3) he [or she] suffered an adverse employment action [refusal

to hire or promote or train leading to employment, demotion, discharge, etc.] and (4) some other circumstance suggests discriminatory motive. [Citations.] [¶] If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. . . . [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [Citations.] [¶] If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] . . . The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff. [Citations.]." (*Guz, supra,* 24 Cal.4th at pp. 354-356.)

"The specific elements of a prima facie case may vary depending on the particular facts." (*Guz*, at p. 355.) This is particularly so with regard to the last element: Other circumstances suggesting a discriminatory motive. For example, *McDonnell Douglas* arose from the defendant's failure to rehire the plaintiff despite job openings. (*McDonnell Douglas, supra,* 411 U.S. at p. 796.) There, the plaintiff was required to show, as the fourth element of the prima facie case, that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (*Id.* at p. 802.) In *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318, a wrongful termination case, the fourth element was described as follows: "Others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class."

When moving for summary judgment on the FEHA claim, an employer can negate the element of discriminatory intent and shift the burden to the plaintiff by showing the plaintiff cannot state a prima facie case of discrimination or the employer had a legitimate, nondiscriminatory reason for the alleged adverse action. (*Guz, supra,* 24 Cal.4th at pp. 356-357, *Sada v. Robert F. Kennedy Medical Center* (1997) 56

Cal.App.4th 138, 150; see also Code Civ. Proc., § 437c, subd. (p)(2) [defendant meets it burden on summary judgment by showing that "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action."].) If the employer sets forth undisputed facts demonstrating a nondiscriminatory reason for its decision, the burden shifts to the plaintiff to produce '"substantial responsive evidence' that that employer's showing was untrue or pretextual. [Citation.]" (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz*, *supra*, at p. 361, fn. omitted.)

b. *Application to Aliu's Race Discrimination Claim*

Aliu's race discrimination claim alleges three grounds for liability under FEHA: (1) repeated failure to hire or promote him, (2) denial of training opportunities leading to promotion or other positions, and (3) demotion or reassignment to lesser positions, which did not prepare him for promotion or other positions.

In its motion, the District asserted it had shown Aliu could not state a prima facie case of race discrimination in hiring and promotions. The District argued while Aliu was able to show he belonged to a protected class, was qualified for the five advanced positions for which he applied, and was rejected despite his qualifications, Aliu was unable to show that after he was rejected, the five positions remained open, and the District continued to seek applicants from persons of Aliu's qualifications. (See *McDonnell Douglas*, *supra*, 411 U.S. 792, 802.) Instead, the undisputed evidence established each of the five positions was filled within weeks of Aliu having been rejected.

Alternatively, the District argued it had articulated legitimate, nondiscriminatory reasons for its failure to hire and promote Aliu. For each of the five positions, the District proffered the declarations of the individuals who made the hiring and promotion

decisions that Aliu was not selected in favor of a more qualified candidate.[4] Finally, the District argued Aliu was unable to show the decision-makers' stated reasons for not hiring and promoting him were a pretext for race discrimination. Aliu introduced no evidence of racial bias on the part of these decision makers. Indeed, at his deposition, Aliu admitted no one in the decision-making capacity said he had not been selected for the positions because of his race.

However, in its motion, the District addressed only one of the three Aliu's alleged grounds of liability for race discrimination: the failure to hire or promote. It entirely disregarded Aliu's allegations he suffered disparate treatment with respect to training and demotions or reassignments to lesser positions because of his race. As a result, the trial court erred in granting summary adjudication of this cause of action.[5] (Code Civ. Proc. § 437c, subd. (f)(1).)

3. Disability Discrimination

a. *Governing Legal Principles*

FEHA prohibits as an unlawful employment practice, unless based upon a bona fide occupational qualification, discrimination against an employee based on the employee's physical or mental disability (§ 12940, subd. (a)), except when the employee's physical or mental disability renders the employee "unable to perform his or her essential duties even with reasonable accommodations . . . ." (§ 12940, subd. (a)(1); see *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1160.) As defined in FEHA, a person is mentally disabled if he or she has an actual "mental or psychological

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[4] These individuals were John Oskoui, Joe Rasch and Matt Woods.

[5] In *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1188-1189, this court found summary adjudication of multiple claims combined in a single cause of action was proper because, as alleging "separate and distinct grounds for liability," these claims constituted separate causes of action. However, unlike the present case, in *Mathieu*, the defendant employer's summary judgment motion and the trial court's ruling on the motion addressed each of the separate and distinct wrongful acts as triable issues by the plaintiff employee, even though they were combined in the same cause of action. (*Ibid.*) Here, there was no attempt to separate the issues, but instead to use evidence as to one to overcome the burden of all.

disorder or condition, such as mental retardation organic brain syndrome, emotional or mental illness or specific learning disabilities, that limits a major life activity" (§ 12926, subd. (i)(1)), or if he or she is *perceived* as having a physical or mental impairment that is disabling, potentially disabling or perceived as disabling or potentially disabling. (§ 12926.1, subd. (b) ["[i]t is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling"]; § 12926, subd. (i)(C)(4) [mental disability includes "[b]eing regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult."].)

Discriminatory intent is an essential element of a claim alleging disparate treatment based on disability, whether actual or perceived. (See *Green v. State of California* (2007) 42 Cal.4th 254, 262 (*Green*). The same three-stage burden-shifting analysis that applies to a race discrimination claim applies to a disability discrimination claim, when direct evidence of discriminatory intent is absent. (*Guz, supra,* 24 Cal.4th at pp. 354-355.) In the context of disability discrimination, the plaintiff establishes a prima facie case of discrimination by showing that he or she (1) suffered from a disability or was regarded as suffering from a disability, (2) could perform the essential duties of the job with or without reasonable accommodations and (3) was subjected to an adverse employment action because of the disability or perceived disability. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236 (*Brundage*), cited with approval in *Green* at p. 261 [plaintiff bears burden as part of prima facie case to show he or she could perform essential duties with or without accommodation]; but see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 51 [when claim is solely for perceived discrimination, the plaintiff need only establish he or she was regarded or treated as disabled and employer's mistaken perception was a substantial factor in the adverse employment decision.].)

b. *Application to Aliu's Disability Discrimination Claim*

After informing Aliu that it could not accommodate his requested work restrictions without undue burden, the District had him undergo a fitness for duty examination, the result of which was that he was found psychiatrically unfit to resume work. The District determined that by reason of mental disability, Aliu could not perform essential functions of his job even with accommodations and placed him on leave, before eventually terminating his employment.

Relying on Dr. Curtis's report, Aliu contends there was a triable issue of fact as to whether he could return to work without accommodations. Aliu contends the District's reliance on Dr. Greenberg's report to determine his unfitness was pretextual, because her evaluation was based on false accounts attributing to Aliu a troublesome work history. In essence, Aliu argues that the District knew Aliu could return to work without restrictions, but instead used Dr. Greenberg's untrue report as a ruse to get rid of a difficult employee. However, accepting this interpretation, Aliu has failed to demonstrate there is a triable issue of fact as to whether the District terminated his employment because of his disability – indeed, it tends to show the contrary. In other words, it is not enough for Aliu to claim pretext; he must show the proffered reason was a pretext for disability discrimination. (See *Guz, supra*, 24 Cal.4th at p. 361 ["[t]he pertinent statutes do not prohibit lying, they prohibit discrimination."]; see also *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 514-515 [113 S.Ct. 2742, 125 L.Ed.2d 407] ["nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."].) Although "[p]roof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons," there must be evidence supporting "a rational inference that the *intentional discrimination, on grounds prohibited by statute, was the true cause of the employer's actions."* (*Guz,* at p. 361.) Accordingly, whatever claim Aliu may have in

connection with the District's purportedly false reasons for discharging him, this failure of causation is fatal to his disability discrimination claim under FEHA.

Even assuming that Aliu could establish a prima facie claim of disability discrimination, the District's decision to terminate Aliu' employment based on Dr. Greenberg's findings was a legitimate nondiscriminatory reason, in view of Aliu's undisputed failure to provide a timely release of Dr. Curtis's report to Dr. Greenberg for consideration.

4. Failure to Engage in Good Faith Interactive Process

a. *Governing Legal Principles*

FEHA makes it unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).)

"The 'interactive process' required by the FEHA is an informal process with the employee or the employee's representative, to attempt to identify a reasonable accommodation that will enable the employee to perform the job effectively. (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 261.) Ritualized discussions are not necessarily required. [Citation.]" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.)

b. *Application to Aliu's Claim for Failure to Engage in a Good Faith, Interactive Process*

In this case, there is no genuine issue of fact that the District engaged in a good faith interactive process with Aliu on two different occasions to discuss reasonable accommodations for him. On the first occasion, the District considered Aliu's request to be reassigned to work for Matt Woods as recommended by Dr. Curtis. The District explained to Aliu that his previous assignment with Woods had been only temporary. A permanent assignment would not be possible, because it would unduly burden Woods. The District also considered Aliu's request to be promoted to School Information

Services Technician, but it told Aliu there were no openings for the position at present, and if an opening occurred, Aliu would have to submit to the competitive examination process to qualify as a candidate. Except for an accounting position, Aliu believed himself unqualified for any other available District positions. Aliu declined to sign the accommodation summary. Aliu remained on administrative leave.

On the second occasion, the District met with Aliu after receiving the conflicting reports of Dr. Curtis and Dr. Greenberg. The District declined Aliu's request to be examined by a third "neutral" mental health care specialist. Instead, the District agreed that an updated, more detailed report from Dr. Curtis could be forwarded to Dr. Greenberg for her review. In the meantime, the District would remove Aliu from administrative leave and place him on statutory leave. However, it was not until approximately six months later that Aliu signed the release enabling Dr. Curtis's report to be made available to Dr. Greenburg.

Aliu does not dispute that the District twice engaged in the interactive process. Instead, Aliu contends there was a triable issue as to whether the District acted in good faith in attempting to accommodate Aliu on each occasion. According to Aliu, this triable issue is whether the District "lied" at the meetings, as suggested by evidence contradicting the District's representation that Matt Woods was supervising an employee at a different employment level than Aliu, and the false accounts of Aliu's troublesome work history upon which Dr. Greenberg relied. However, other than asserting the District lied for the purpose of "mislead[ing] and deceiv[ing] [him]" at the meetings, Aliu fails to show how the proffered evidence created a genuine issue of fact relevant to his claim of failure to engage in good faith interactive process.

The Demurrers

1. Standard of Review

When the trial court sustains a demurrer without leave to amend, we give the complaint a reasonable interpretation, assuming to be true all material facts that have been properly pleaded; if there is a reasonable possibility that the plaintiff could allege

facts that would cure the defect, we must reverse. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. Aliu's Complaint and the District's Successful Demurrer

In his complaint, Aliu named the Personnel Commission of Long Beach Unified School District in addition to the District, as a defendant: "Defendant, PERSONNEL COMMISSION OF LONG BEACH UNIFIED SCHOOL DISTRICT ("COMMISSION") at all times relevant to this complaint, set up under the Education Code because the [the District] operates a "merit system or civil service type of employment system, under the provisions of the State of California Education Code." Based on information and belief, the Commission is a separate legal entity."

Following a hearing, the trial court sustained the District's demurrer without leave to amend as to all causes of action alleged against the Commission.

Aliu contends the trial court erred because he had sufficiently alleged the Commission was his employer. We conclude the complaint could not have been amended to properly allege the Commission as a defendant. [6]

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[6] On appeal, the District argues by amending his complaint and omitting the Commission, Aliu effectively dismissed the Commission from the action, and he cannot now seek review of the order sustaining the demurrer without leave to amend as to that defendant or causes of action alleged against that defendant. In the context of a demurrer, "[w]hen a demurrer to a cause of action is sustained with leave to amend, the plaintiff may elect not to amend the cause of action. The order sustaining the demurrer is treated as an intermediate order with respect to that cause of action, appealable at the time of a final judgment, and the plaintiff is deemed to have elected to stand on the validity of the cause of action as originally pleaded. [Citations.] 'The rule that a choice to amend waives any error can reasonably be applied only on a cause-of-action-by-cause-of-action basis. If a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action or amended versions of the remaining causes of action, no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment. It is only where the plaintiff amends the cause of action to which the demurrer was sustained that any error is waived.' [Citation.]" (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc*. (2009) 171 Cal.App.4th 35, 44.) In short, Aliu was not required to "continue to re-allege the 'dead' cause[s] of action in future amended complaints in order to preserve the right of appeal regarding its

FEHA precludes employers from engaging in unlawful employment practices. Aliu is correct that under FEHA, an employer includes any person regularly employing five or more persons; or "any person acting as an agent of an employer, directly or indirectly," as well as the state, any political or civil subdivision of the state, and cities. (§ 12926, subd. (d).) However, the reference to "any person acting as an agent of the employer" was intended by the Legislature "to ensure that *employers* will be held liable if their supervisory employees take actions later found discriminatory." (*Reno v. Baird* (1998) 18 Cal.4th 640, 647.) Aliu did not allege in his complaint that the Commission was either his employer, or acting as an agent of his employer, the District, within the meaning of FEHA.

FEHA also protects employees from unlawful employment practices. Aliu did not allege he had an employment relationship with the Commission, such that the Commission had the right to control and direct his activities, and the manner in which he performed his work for the District. (See *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718, 721.) Instead, Aliu specifically alleged the Commission was "a separate legal entity" from the District. The record on appeal shows it is undisputed that Aliu was employed by the District, not the Commission. Because there was no employer-employee relationship between the Commission and Aliu, the complaint failed to state facts sufficient to allege a cause of action against the Commission.

3. Aliu's First-Amended Complaint and the District's Successful Demurrer

a. *Cause of Action for Age Discrimination*

In his fourth cause of action, Aliu purportedly alleged a claim of age discrimination by "72. . . . realleg[ing] and incorporate[ing] herein by reference each and every allegation contained in paragraphs 41 through 51, inclusive, as though fully incorporated herein and made a part hereof. [¶] ALIU substitutes age in place of race in the aforementioned paragraphs 41 through 51."

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validity. . . . [S]uch pointless reallegation is unnecessary to avoid waiver." (*National Union Fire*, *supra*, at p. 45.)

The trial court sustained the District's demurrer to this cause of action without leave to amend. To be sure the cause of action was woefully defective. Nonetheless, '"'"[i]n furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint.'"'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970.) Leave to amend may be granted on appeal even in the absence of a request by the plaintiff to amend the complaint. (*Id.* at p. 971; see Code Civ. Proc, § 472c, subd. (a).)

At the demurrer hearing, Aliu's counsel pointed to paragraphs in the complaint in which reference was made to Aliu's protected status as an employee over the age of 40. Counsel then explained to the court that, in drafting the fourth cause of action, it was his intent to allege that the same facts upon which Aliu concluded he was the subject of race discrimination also supported a claim of age discrimination against the district. This explanation was sufficient to support leave to amend as to the fourth cause of action for age discrimination. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 [We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading"].) On remand, Aliu should be given leave to amend his cause of action for age discrimination.

b. *Causes of Action For Harassment*

In his fifth and sixth causes of action, Aliu asserted claims of racial and religious harassment respectively against the District and individual District employees Matt Wood, Kevin Young, and Steve Crothers. The trial court sustained the District's demurrer to these causes of action without leave to amend as to all four defendants.

FEHA prohibits harassment of an employee because of race or national origin, and religious creed. (§ 1240, subd. (j)(1).) "[H]arassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee. [¶] . . . When the harasser is a supervisor, the employer is strictly liable for the supervisor's actions. [Citation.] When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should

have known of the harassment and failed to take appropriate corrective action). (§ 12940, subd. (j)(1).)" (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706-707.)

For a claim of racial or religious harassment under FEHA, an employee must allege (1) he or she was subjected to unwelcome conduct or comments; (2) the harassment complained of was based on his or her race or religion; and (3) the harassment was so severe and pervasive as to alter the conditions of employment and create an abusive working environment. (*Etter v. Veriflo Corp*. (1998) 67 Cal.App.4th 457, 463-465.)

With respect to both causes of action, Aliu alleged: Matt Woods was acting in the course and scope of his employment as Network Administrator; Kevin Young was acting in the course of his employment as Computer Equipment Support Manager and Steve Crothers was acting in the course and scope of his employment as Computer Equipment Supervisor.

In his fifth cause of action for racial harassment, Aliu alleged that Matt Wood, Kevin Young, Steve Crothers (and the District) were "constantly engaged in anglicizing" his "Moslem name, Shamusideen, by calling him Shamu," despite Aliu's persistent objections. Aliu also asserted Crothers "physically threatened to have [him] on a stretcher," and "almost only a daily basis," the supervisors "barraged Aliu with comments that he was not welcome to Computer Shop 7, as "Aliu's arrival had upset the master plan of the Shop," which was the promotion of non-protected employees as opportunities for advancement arose. Aliu alleged the supervisors' acts were motivated by Aliu's race, color, and natural origin, as African-American and Nigerian, and created a hostile working environment.

In his sixth cause of action for religious harassment, Aliu alleged that Matt Wood, Kevin Young, Steve Crothers (and the District) knew he was a practicing Moslem who worshipped at 1:00 p.m. every Friday at a local mosque. Nonetheless on one Friday at 12: 45 p.m., Young gave Aliu a work assignment, which prevented Aliu from attending his worship. When it happened again, Aliu reminded Young of his need to worship, and Young replied Aliu had to choose between "the job or the mosque." On another

occasion, Young asked why Aliu believed "God was with him, in that Aliu prayed at the mosque every Friday, when nothing changed in Aliu's life. Crothers allegedly harassed Aliu, not only by "anglicizing Aliu's Moslem name" to Shamu but also by instructing Aliu to keep his Radio/GPS turned on while worshiping at the mosque. Aliu was offended by the comments and conduct of Young and Crothers, which were motivated by Aliu's religious creed (Muslim) which created a hostile work environment for Aliu. He reported these incidents to Wood and to the District, but they took no remedial action.

Liberally construing the pleadings, as we must (see *Schifando .v City of Los Angeles, supra,* 31 Cal.4th at p. 1081), Aliu's first-amended complaint adequately alleged that as Aliu's supervisors, Matt Woods, Kevin Young and Steve Crothers subjected him to unwelcome conduct or comments, based on his race and religion, which were sufficiently severe as to create an abusive working environment. Accordingly, the demurrer should have been overruled.

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded for further proceedings as follows: The judgment on summary judgment is reversed. As to the cause of action for age discrimination, we reverse the order sustaining the demurrer without leave to amend and remand the matter to the trial court with directions to enter a new and different order granting Aliu leave to amend that cause of action. As to the causes of action for racial and religious harassment, we reverse the order sustaining the demurrer without leave to amend. We otherwise affirm, and remand for further proceedings consistent with this opinion.

Aliu is to recover his costs of appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.